



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2005

Mr. Charles W. Schiesser
Enforcement Attorney
Texas Board of Architectural Examiners
P.O. Box 12337
Austin, Texas 78711

OR2005-03511

Dear Mr. Schiesser:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 222611.

The Texas Board of Architectural Examiners (the "board") received a request for information pertaining to any complaints and disciplinary action taken against a named architect. You state that the board has released some of the responsive information, but claim that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes a court-filed document that is expressly public under section 552.022 of the Government Code. This document may not be withheld unless it is confidential under other law. *See* Gov't Code § 552.022(a)(17). Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, sections 552.103 and 552.111 are not "other law" that make information confidential for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Accordingly, you may not withhold the court-filed document at issue under section 552.103 or section 552.111. You also contend, however, that the information at issue is protected by the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. Since the Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules

of Civil Procedure are “other law” within the meaning of section 552.022, we will consider whether any of the information at issue may be withheld under rule 192.5 of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

For the purpose of section 552.022(a), information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat’l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Upon review, we conclude that the section 552.022 document at issue does not reflect the mental processes, conclusions, strategies, or legal theories of board attorneys regarding anticipated litigation. Thus, this information is not protected by the attorney work product privilege and may not be withheld on that basis.

You also claim that the section 552.022 information is protected from disclosure under section 552.101 and the informer’s privilege. The common law informer’s privilege is other law for the purpose of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm’n on Envtl. Quality v. Abbott*, No. GN-204227 (126 Dist. Ct., Travis County, Tex.). The informer’s privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex.

Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *see also Roviario v. United States*, 353 U.S. 53, 59 (1957). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The informer's privilege does not, however, apply to information that does not describe alleged illegal conduct. Open Records Decision No. 515 at 5 (1988). In addition, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Roviario*, 353 U.S. at 60. Upon review of the information at issue, we find that it does not reflect the identity or identities of informers. Thus, the informer's privilege does not apply to the section 552.022 information at issue and it may not be withheld on this basis. Thus, the section 552.022 information we have marked must be released to the requestor.

We now address your claims under section 552.103 of the Government Code for the remaining submitted information. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The board has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.);

Open Records Decision No. 551 at 4 (1990). The board must meet both prongs of this test for information to be excepted under 552.103(a).

For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588. You inform us that, pursuant to a formal complaint, the board commenced an investigation of an architect for possible violations of chapter 1051 of the Occupations Code. You also state that, according to the board's rules and regulations, "all investigations that result from formal complaints must be conducted according to the provisions of the [APA.]" Finally, you explain that, as a result of the investigation, the board "is involved in a proceeding to determine the legal rights and privileges of the [architect]" and the proceeding is pending. Based on these representations, we agree that the board has shown that litigation, in the form of a contested proceeding under the APA, was pending in this matter prior to the board's receipt of the present request for information. Furthermore, we have reviewed the remaining information and find that it relates to the pending litigation for purposes of section 552.103(a). Therefore, the board may withhold the remaining information at issue pursuant to section 552.103.¹

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, responsive information to which the opposing party in the anticipated litigation has had access is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the court-filed document we have marked must be released to the requestor. The remaining submitted information may be withheld under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

¹ Because we are able to resolve this under section 552.103, we do not address your other arguments for exception.

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 222611

Enc. Submitted documents

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